

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 14, 2007

**RICHARD BROWN, JR. v. TENNESSEE BOARD OF PROBATION AND
PAROLE**

**Appeal from the Chancery Court for Davidson County
No. 03-2355-III Ellen Hobbs Lyle, Chancellor**

No. M2005-00449-COA-R3-CV - Filed on July 6, 2007

An inmate filed a petition for writ of certiorari challenging a Board of Parole decision and alleged several grounds, including lack of notice and discrimination. The trial court found the petitioner alleged no grounds upon which to disturb the board's decision, and we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Richard Brown, Jr., Mountain City, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor General, Kellena Baker, Assistant Attorney General, for the appellee, Tennessee Board of Probation and Parole.

OPINION

This appeal involves a prisoner's challenge to a decision of the Tennessee Board of Probation and Parole ("Board"). Richard Brown, Jr., an inmate in the custody of the Tennessee Department of Correction, had been convicted of second-degree murder, aggravated robbery and especially aggravated robbery that occurred in 1992.

On June 2, 2003, a parole hearing was held to review Mr. Brown's suitability for parole. Board Member Bill Dalton was the hearing officer. Mr. Dalton voted to continue the hearing until September of 2003 pending a psychological evaluation to address Mr. Brown's propensity for violence. Adoption of Mr. Dalton's recommendation by the Board required four (4) votes. On June 10, 2003, the Board voted to reject Mr. Dalton's recommendation. Rather than accept Mr. Dalton's

recommendation, four Board members voted to deny Mr. Brown's parole request based on the seriousness of the offense¹ and set his next parole hearing for June of 2007.

I. STANDARD OF REVIEW

Prisoners do not have an absolute right to be released from confinement prior to the expiration of their sentence. *Graham v. State*, 304 S.W.2d 622, 623-24 (Tenn. 1957); *Robinson v. Traughber*, 13 S.W.3d 361, 364 (Tenn. Ct. App. 1999); *Tarpley v. Traughber*, 944 S.W.2d 394, 395 (Tenn. Ct. App. 1996). Thus, parole is a privilege and not a right. Tenn. Code Ann. §§ 40-28-117(a), 40-35-503(b); *Arnold v. Tennessee Bd. of Paroles*, 956 S.W.2d 478, 482 (Tenn. 1997). Whether a prisoner should be granted parole is a decision entrusted to the Board, not the courts. *State ex. rel. Ivey v. Meadows*, 393 S.W.2d 744, 747 (Tenn. 1965); *Rucker v. State*, 556 S.W.2d 774, 776 (Tenn. Crim. App. 1977). Consequently, decisions of the Board of Paroles whether to grant or deny parole to an individual are not reviewable by the courts if done in accordance with the law. *Flowers v. Traughber*, 910 S.W.2d 468, 470 (Tenn. Crim. App. 1995).

The question of whether such decisions are lawful is subject to limited review under the common law writ of certiorari. *Baldwin v. Tennessee Bd. of Paroles*, 125 S.W.3d 429, 433 (Tenn. Ct. App. 2003); *Flowers*, 910 S.W.2d at 470. Thus, persons dissatisfied with a decision of the Board may obtain judicial review using the procedures set out in Tenn. Code Ann. § 27-9-101 *et seq.*, which provide for review of a decision by a board or commission through the common law writ of certiorari. The common law writ of certiorari limits the scope of judicial review, and a court may grant relief under the writ only if it finds that the board or commission has exceeded its jurisdiction or that it has acted illegally, arbitrarily or fraudulently. *Blackmon v. Tennessee Bd. of Paroles*, 29 S.W.3d 875, 878 (Tenn. Ct. App. 2000); *Turner v. Tennessee Bd. of Paroles*, 993 S.W.2d 78, 80 (Tenn. Ct. App. 1999); *South v. Tennessee Bd. of Paroles*, 946 S.W.2d 310, 311 (Tenn. Ct. App. 1996); *Powell v. Parole Eligibility Review Bd.*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994).

II. ANALYSIS

Mr. Brown filed a petition for a common law writ of certiorari asking the trial court to review the Board's decision claiming it was arbitrary, capricious and illegal. The trial court thoroughly discussed all issues raised by Mr. Brown and concluded that the Board did not act in an arbitrary, capricious or illegal fashion. Mr. Brown appeals the trial court's decision on two grounds. First, Mr. Brown claims the decision itself was defective for several reasons. Second, Mr. Brown argues he should have been able to raise an equal protection claim in his petition. Due to the trial court's thorough review of Mr. Brown's petition, we will quote the trial court's reasoning at length.

A) Notice of Decision And Comments By Board Member

¹This is based on the seriousness of the offense standard set forth in Tenn. Code Ann. § 40-35-503(b), which explains "[t]he release from custody at this time would depreciate the seriousness of the crime of which the defendant stands convicted or promote disrespect of the law." Tenn. Code Ann. § 40-35-503(b).

According to Mr. Brown, the Board's decision was illegal since its decision was defective in several respects. According to Mr. Brown, the Board did not properly put its decision in writing together with the reasons for the denial of his parole. Also, he argues that the Board Chairman's comments were improper. Several permutations of these defects were argued by Mr. Brown. The trial court attempted to address any possible legal argument that arose from his allegations.

1) Notice of Board Decision

On this issue, the trial court found as follows:

. . . the Petitioner argues that the Board acted illegally by failing to give the Petitioner a complete decision of what was relied on and the reasons for the parole denial. This last argument appears to have several prongs. First, the Petitioner argues that the decision he received had missing text at the bottom of the page. Second, the Petitioner argues that the comments written by the chairman were improperly relied on by other Board members and also were never provided to the Petitioner as required by the parole regulations. And, third, the Petitioner argues that he never received written reasons for his parole denial as required by the parole regulations. These arguments are discussed in turn.

The Petitioner argues that the Notice of Board Action form that he received was insufficient because it contained missing text at the bottom of the page. The Respondent counters that this document with missing text was a copy and not the original supplied when the Board first denied his parole. The record is not clear as to the facts, but either way, the Petitioner's argument fails. First, even without the missing text, the Notice of Board Action form states that the Board has voted to deny the Petitioner's parole due to the seriousness of the offense. Secondly, it appears that the Petitioner, for some time now, has possessed a complete copy of the form which cures any possible defect that might have existed in the form initially.

. . .

Finally, the Petitioner argues that the decision of the Board was illegal, arbitrary and capricious because of the insufficiency of the Notice of Board Action. Petitioner argues that the Notice of Board Action form was insufficient because "it clearly fails to state a valid [sic] reason for the denial of parole."

Apparently, the Petitioner is taking the position that the Notice of Board Action form does not state a valid reason for the denial of parole because a box was not checked on the right side of the form. As a comparison, the Petitioner contrasts his Notice of Board Action form with the form of another inmate, Derrick Willis Gilbert. However, there is a logical explanation for the difference in the two forms.

On Gilbert's form, it appears that the hearing officer recommended to deny parole because of the seriousness of the offense. To indicate his recommendation, the hearing officer checked the box next to "DS" meaning decline and the box next to "SO" providing that his reason for denial is that the release from custody at this time would depreciate the seriousness of the crime. At the bottom of the form, four Board members voted to adopt the hearing officer's recommendation by initialing the form and checking the box marked "ADP."

On the Petitioner's Notice of Board Action form, as mentioned above, the hearing officer recommended to continue the hearing pending a psychological evaluation. This was clearly marked in the top right corner of the form. However, four Board members rejected the hearing officer's recommendation by initialing the bottom of the form and checking the "REJ" box indicating rejection. All four Board members then wrote "(DS)" on the form indicating that they were declining parole, and also wrote "(SO)" on the form indicating the reason for denial, which is that the release from custody at this time would depreciate the seriousness of the crime of which the offender stands convicted or promote disrespect of the law. The four Board members also indicated the next review for Petitioner would be June 2007. Petitioner's Notice of Board Action form, consequently, was clearly sufficient to provide Petitioner with notice of the denial of parole and a valid reason for the parole denial.

On appeal Mr. Brown does not take issue with the trial court's factual predicates. Based on the record before us, it is clear that Mr. Brown received written notice both that his parole had been denied and the reasons therefor.

2) Comments by Board Chairman

The trial court also discussed the Board Chairman's comments at length and Mr. Brown's objections.

Next, the Petitioner argues that the comments written on the Notice of Board Action form by Chairman Charles Traughber were improperly relied on by other Board members and were never provided to the Petitioner as required by the parole regulations. Chairman Traughber, while voting to deny Petitioner parole also wrote, "Remark: While Mr. Brown is reported to be a 1st offender; hon. Discharge from A. Force: on drugs when he was committing various robberies w/a firearm and shot a clerk in the head, he has not served 30% of 50."

The Petitioner insists that the parole regulations provide that "[o]ffenders shall have the right to review all documents at the time of the hearing, that will be considered by the hearing official. . . ." Petitioner's reliance on this regulation is misplaced. It is a logical impossibility to require the Board to provide the Petitioner with post hearing comments by individual Board members at the time of the hearing. And, in fact, this is not what the regulation requires. The regulation requires that the

Petitioner shall have the right to review all documents at the time of the hearing that will be considered by the hearing official, who in this case was Mr. Dalton. It is clear from the record that the hearing official, Mr. Dalton, did not and could not have considered Chairman Traugher's comments and, thus, the Petitioner was not entitled to review them.

Also, Petitioner argues that the chairman's comments influenced other Board members without giving the Petitioner the opportunity to refute the accuracy of the information. However, it is clear from the record that only one Board member initiated the notice form after Chairman Traugher's comments, and she provided her own reason for denial of parole. Moreover, the Petitioner has not alleged any inaccuracies in the comments written by the chairman. In fact, the record supports the accuracy of the chairman's comments. By his own admission at the parole hearing, the Petitioner did, in fact, commit robberies while on drugs with a firearm and shoot a clerk in the head. Furthermore, as stated by Respondent, there is nothing in the parole regulations that prevent Board members from relying on the advice, comments, or opinions of other Board members, and, in fact, this practice is more likely encouraged.

Under these circumstances, the Board Chairman's comments were not inappropriate and did not in any way prejudice Mr. Brown. We agree with the trial court.

3) Equal Protection Claim

The trial court looked at Mr. Brown's equal protection claim as possibly making two alternative arguments; first, that he was raising an independent equal protection cause of action and second, that he was attacking the Board's decision as discriminatory.

First, the trial court construed Mr. Brown's allegations as raising an independent equal protection cause of action in his petition for a common law writ as follows:

The Petitioner next alleges that the Board acted in a manner that was illegal, arbitrary and capricious because it violated equal treatment in a discriminatory manner. Essentially, the Petitioner argues that the Board has a history of granting parole to white inmates while denying parole to black inmates with analogous criminal records. The Petitioner has seemingly brought a direct equal protection cause of action against the Board. The writ of certiorari is not the proper vehicle for this cause of action and a direct equal protection claim cannot be joined with the Petitioner's other arguments properly considered by the writ of certiorari. Thus, to the extent the Petitioner is making a direct equal protection claim against the Board, the Court dismisses this cause of action without prejudice.

The trial court is correct. An appellate cause of action (*i.e.*, a petition for common-law writ of certiorari) cannot be joined with an original cause of action (*i.e.*, a complaint for inverse condemnation). *Winkler v. Tipton County Bd. of Educ.*, 63 S.W.3d 376, 383 (Tenn. Ct. App. 2001); *Goodwin v. Metro. Bd. of Health*, 656 S.W.2d 383, 386-87 (Tenn. Ct. App. 1983) (holding that “[t]he necessity of a separation of appellate review of a matter and trial of another matter ought to be self evident. . . . Like water and oil, the two will not mix”). Where an original action for damages has been joined with a petition for writ of certiorari, the claim for damages should be dismissed at the very outset. *Byram v. City of Brentwood*, 833 S.W.2d 500, 502 (Tenn. Ct. App. 1991); *Goodwin*, 656 S.W.2d at 387.

In the event Mr. Brown was attacking the Board’s decision as discriminatory and therefore arbitrary or illegal, the trial court found as follows:

However, the Petitioner also suggests that the Board’s decision was illegal, arbitrary and capricious because it was the result of racial discrimination. If the Petitioner could show that the decision of the Board was based on racial discrimination, that, of course, would be legitimate proof of an arbitrary and capricious decision. But, as mentioned above, the Petitioner has a heavy burden when challenging the decision of an administrative agency. All the Respondent need show is that there was a rational basis for the decision. The record is replete with evidence sufficient for the Board to determine that releasing Petitioner would depreciate the seriousness of the crimes of which the Petitioner is convicted. Because there is a rational basis for the Board’s decision, the argument that the Board’s decision was illegal, arbitrary and capricious because it was based on racial discrimination must fail.

Other than conclusory allegations of discrimination, Mr. Brown’s charge is without support. He has neither alleged nor shown the basic requirements of disparate impact and discriminatory intent. As the trial court found, there is ample evidence to support the Board’s decision. The “seriousness of the offense” reason for denying parole is neutral. The record supports the conclusion that the decision was neither arbitrary nor illegal.

The trial court is affirmed. Costs of this appeal are taxed to the appellant, Mr. Brown for which execution may issue if necessary.

PATRICIA J. COTTRELL, JUDGE